sentence sufficiently to be restored to competency as a witness, although he serves the jail sentence, and upon a capias pro fine, is held for such a time in jail as will satisfy the fine, is most extraordinary and harsh, it would seem, but, at the same time, unavoidable in the light of the statute. In short, fine and costs are not satisfied by imprisonment, which is but a means of enforcing payment.

The modern tendency is toward a greater liberality in the admission of evidence. Moreover by statute in most of the states the fact that a witness has been convicted of any crime, however that crime may imply or indicate his utter lack of respect for truth, is no objection to his competency, but is admissible to affect his credit in all instances in which, under the rules of the common law, the witness would have been held to have been incompetent. No state has taken a step backward which has tried this experiment. Why not make our rules governing the admissibility of evidence, and the competency of witnesses, more liberal, and leave it to the jury to judge of its weight?

FULKERSON v. CITY OF BRISTOL.

June 21, 1906.

[54 S. E. 468.]

Municipal Corporations — Assessments — Unequal Assessments. — Under the constitutional requirement of equality and uniformity of taxation, an assessment for a street improvement cannot be enforced against one property owner of a class, when all of the class originally liable to the assessment cannot be compelled to pay the assessment because of the failure of the corporate authorities to perfect the assessment against all the property before the adoption of a constitutional provision abolishing the right to make and levy such an assessment.

Appeal from Corporation Court of Bristol.

Suit by the city of Bristol to enforce payment of an assessment for a street improvement against S. V. Fulkerson. From a decree in favor of complainant, defendant appeals. Reversed.

Fulkerson, Page & Hurt and *Bullitt & Kelly,* for appellant.
Roberts & Roberts, for appellee.

CARDWELL, J. The question involved in this case is the right of the appellee, the city of Bristol, to enforce payment of a local assessment levied upon the property of appellant to defray the expenses of paving a street of the city upon which the property abuts. The improvement for which the assessment is levied, pursuant to authority in the city conferred by section 72 of its charter (Acts 1899-1900, pp. 627-640, c. 611, et seq.), was made in the year 1901, and at the December term, 1901, of the corporation court of the city, the assessment upon the property of

appellant and other properties similarly situated was submitted to the court. Exceptions by some of the property owners, including appellant's father, from whom appellant derives title to the property upon which it is here sought to enforce the assessment, were taken, which were overruled, and the report confirmed as to some of the exceptants, including appellant's father. As to certain other property owners, upon whose property it was proposed to make an assessment, who had not been notified of the proceedings before the board of assessors, the report was recommitted.

At the January term of the court, 1903, a report was filed by the board of assessors as to the assessments which had been recommitted to them as stated, and at a subsequent term a part of the assessments then reported were confirmed over exceptions, and the report again recommitted as to certain property owners who had not then been notified of the proceedings before the assessors. No further report has been made or proceedings had as to the assessment against the property owners as to whom the second report was recommitted, and it appears that the city has abandoned any effort to make an assessment upon their property on account of the improvements, for the payment of which the property of appellant and others was assessed by the reports of the assessors, confirmed at the December term, 1901, and the February term of the court, 1903, respectively.

The bill in this cause was filed by the city of Bristol in June, 1905, to enforce payment of the assessment upon the property of appellant, confirmed at the December term of the court, 1901, and to this bill appellant presented his answer, setting up the matters above mentioned and alleging as a complete defense to the suit that the complainant, appellee here, being debarred from collecting the assessments upon all the property embraced in the report of the board of assessors filed in December, 1901, should not be permitted to enforce payment of any of those assessments. because to do so would be inequitable, and because there was, and could be, no uniformity in the taxation of the several properties for the improvements in question by reason of the fact that the city had delayed the proceedings as to some of the property owners until after the new Constitution took effect, July 10, 1902, whereby their properties could not be required to bear the burden of this special assessment, and whereby it would become necessary to pay for said improvements in large part by general assessments which by reason of their bearing upon appellant's property would further increase the inequality and lack of uniformity in the taxation of his property.

Exceptions to the answer were sustained, and a decree entered against appellant for the amount asserted in the bill. Therefore the question for determination, as stated in the outset, is, has

appellee the right to enforce the payment of the assessment asserted in its bill?

The assessments which were confirmed upon the consideration of the report filed January 13, 1903, came under the review of this court in Hicks *v.* City of Bristol, 102 Va. 861, 47 S. E. 1001, and it was held that after the present Constitution took effect, July 10, 1902, the local assessments sought to be enforced against the property of Hicks and others had not been assessed, and could not be without further exercise of a power which the city no longer had, since the provision in its charter which conferred the power to make assessments to defray the expense of local improvements had been repealed, and dismissed the proceedings against plaintiffs in error.

Section 170, art. 13, of the present Constitution [Va. Code, 1904, cclxiii] is: "No city or town shall impose any tax or assessment upon abutting landowners for streets or other public local improvements, except for making sidewalks upon existing streets, and improving the existing alleys, and for their construction, or for the use of sewers; and the same, when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting landowners."

The effect of that section and section 117 of the Constitution [Va. Code 1904, p. ccxxxviii] was to amend the charter of the several cities and towns in the commonwealth, so as to conform to all the provisions, restrictions, limitations, and powers set forth in article 8, or otherwise provided in the Constitution, and to repeal such charters so far as they authorized a local assessment for street paving, etc. Hicks *v.* City of Bristol, supra.

It was further held in that case that sections 3 and 4 of the Schedule of the Constitution, the one providing, "Except as modified by this Constitution, all suits, actions, and causes of action, prosecutions, rights of individuals, of bodies corporate or politic and of the state, shall continue," and the other, "All taxes, fines, penalties, forfeitures and escheats, accrued or accruing to the commonwealth, or to any political subdivision thereof, under the present Constitution, or under the laws now in force, shall under this Constitution enure to the use of the commonwealth, or of such subdivision thereof," did not reserve to the city of Bristol the authority to enforce payment of the assessment upon the property of plaintiffs in error asserted in that suit.

The assessment sought to be enforced in this case was made at the same time, on the same street, and under the same ordinance that assessments against other properties for the same improvements which cannot be collected or enforced as ruled in Hicks *v.* City of Bristol, supra, were made; and it is contended for the city that the last-named case is to be distinguished from

the case under consideration by the fact that the assessment sought to be enforced against appellant's property was perfected before the adoption of the present Constitution, whereby the city, by virtue of section 72 of its charter then in force, acquired a lien on the abutting property now owned by appellant as the only their at law of A. Fulkerson, deceased, who owned the property when the assessment in question was made. In other words, the contention is that this lien cannot be collaterally impeached, and a number of authorities are cited for that proposition; but we are of opinion that they have no application to the case.

The precise question to be here considered and determined is, can an assessment to meet the costs of a local improvement to a street be enforced against one property owner of a class, when all of the class originally liable to the assessment cannot be compelled to pay the assessment because of the delay and failure of the corporate authorities to perfect its assessments against all the properties before the adoption of the Constitution of 1902, which by its express terms put an end to all right to make and levy such assessments?

Clearly the assessment in question cannot be uniform, because it appears that even if all the assessments, as made by the report of December, 1901, had been collected, still a part of the cost of the improvement would have been paid for out of the general fund of the city arising from taxation, for the reason that because of the failure of the city authorities to perfect its proceedings for assessment by notice to all the parties upon whom the assessment was to fall, the city is unable since the adoption of the present Constitution to collect from these property owners, and it follows that an increased part of the costs of the improvement must be provided for by general taxation; the result being that some property owners whose properties may have been benefited by paving the streets, and so reported by the assessors, pay no special tax for the same, while as to others, including appellant, the city is endeavoring to compel them to pay the full amount assessed against their property for such supposed benefit, and in addition will require them to contribute in general taxation to make up for the deficiency arising from the delay and neglect of the city in its proceedings, not only as to owners of property on the streets named in the report of December, 1901, but as to owners of other property on other streets against whom proceedings were ineffectually taken.

Undoubtedly the city had authority under its charter, prior to the adoption of the present Constitution, to make and collect a special assessment such as is sought to be collected of appellant, and the constitutional requirement of equality and uniformity only extends to such objects of taxation as the Legislature shall

determine to be properly subject to the burden of the power to determine the persons and the objects to be taxed being trusted exclusively to the legislative department; but over all those objects the burden must be spread, or it will be unequal and unlawful as to such as are selected to make the payment. Cooley on Const. Lim. (6th Ed.) 633. The same author, discussing the requirement that taxation must be levied with equality and uniformity, at page 608 says: "In this particular the state Constitutions have been very specific, though in providing for equality and uniformity they have done little more than to state in concise language a principle of constitutional law which, whether declared or not, would adhere in the power to tax."

A tax, whether direct upon property in proportion to its value, or upon some basis of apportionment which the Legislature shall regard as just, must keep in view the general idea of uniformity. Same author, at page 609, 6 A. & E. Enc. L. (2d Ed.) 967.

A tax upon property owners, according to benefits arising from local improvements, like any other tax, can neither be levied nor collected without special legislative authority, and the burden of such a tax must be borne equally and uniformly by all of the owners of the properties benefited. Therefore, in our view, no matter at what stage in the proceedings to assess and collect the tax the lack of the required equality and uniformity in the burden of the tax is disclosed, the authority to assess or to collect the tax ceases.

It was expressly held in Hicks *v.* City of Bristol, supra, that the repeal of a tax law puts an end to all right to proceed to a levy of a tax under it, even in cases already commenced, unless the right is reserved in the repealing statute, and statutory remedies for the enforcement of a tax are gone when the statute is repealed without a saving, and that the repeal of that portion of the charter of appellee authorizing the imposition of a local assessment for a particular purpose contained no saving of the right to levy the assessment, although the proceedings to levy the assessment had already commenced prior to the repeal of the law authorizing the assessment.

That the same principle applies to a case where the assessment is made, but not enforced to a collection, before the law authorizing the assessment was repealed, necessarily follows, as it seems to us. It is analogous to the principle maintained upon a number of authorities cited in Dulin's Case, 91 Va. 718, 20 S. E. 821, and Terry *v.* McClung, 104 Va. —, 52 S. E. 355.

In the first-named case it was said: "Whenever a court is deprived of jurisdiction over any class of cases by the repeal of a statute which gives the jurisdiction, and there is no provision made for the transfer of such cases to some other court which has or is given jurisdiction, and no reservation made for the

trial of pending cases is such court, all such cases fall with the repealed statute."

In Terry *v.* McClung, supra, it was held, that an act of the Legislature depriving the county court of Highland county of all jurisdiction in road cases and conferring the same on the board of supervisors, and which contains no saving clause providing for the transfer of pending cases to such board, where no final order establishing a road as applied for, and from which an appeal would lie, was made, and while the matter was in fieri and undetermined, said act was passed, the proceedings lapsed with the repeal of the statute under which they were instituted.

We are of opinion that upon the repeal by the adoption of the present Constitution of so much of appellee's charter as authorized the making of special assessments upon abutting lands or lots for the purpose of paying the costs of local improvements to the city's streets, the right to make or to enforce payment of such assessments, though made before the repeal of the statute, fell with the repealed statute. Therefore the decree appealed from must be reversed and annulled, and this court will enter such decree as the lower court should have entered, dismissing appellee's bill, with costs to appellant.

KEITH, P., absent.

MCILVANE *v.* BIG STONY LUMBER CO. *et al.*

June 28, 1906.

[54 S. E. 473.]

1. Frauds, Statute of—Construction.—Code 1904, § 2840, provides that certain actions cannot be maintained unless the contract or undertaking is in writing and signed by the parties to be charged thereby. Held, that such section was intended to prohibit actions in certain designated cases, and did not authorize the maintenance of an action on a contract by one not a party thereto, nor sought to be charged thereby.

2. Contracts—Persons Entitled to Sue—Privity.—Code 1904, § 2860, authorizes the assignee of a bond or any other chose in action to sue in his own name and to maintain any action which the original obligee, payee, or contracting party might have brought. Held, that such section did not authorize an original creditor to sue at law on covenants by third persons to assume and pay the debt, where there was no consideration passing from such creditor to such covenantors and there was no privity between them.

3. Covenants—Deed of Another—Assumption.—A corporation indebted to plaintiff transferred its assets by deed to a trustee, subject to certain liabilities, which the trustee and his associates covenanted